

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JON ROY,

Defendant and Appellant.

E048053

(Super.Ct.No. FSB804557)

OPINION

APPEAL from the Superior Court of San Bernardino County. Ronald M. Christianson, Judge. Affirmed.

Shawn O’Laughlin, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia, and Meagan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jon Roy appeals his conviction on one count of corporal abuse of a co-habitant and one count of terrorist threat. He contends, on several grounds, that the trial court committed reversible error when it refused to admit evidence that he was not prosecuted in a prior incident of domestic abuse which was admitted pursuant to Evidence Code section 1109 as evidence of his propensity to commit domestic violence.

We conclude that in some instances, evidence that a defendant was not prosecuted for a prior alleged offense may be relevant to rebut the prior offense evidence. Here, however, the evidence proffered by the defense was not relevant, and it was properly excluded.

PROCEDURAL HISTORY

Defendant was charged with corporal injury to a co-habitant (Pen. Code, § 273.5, subd. (a); count 1); criminal threats (Pen. Code, § 422; count 2); and assault with a deadly weapon, a hammer (Pen. Code, § 245, subd. (a)(1); count 3). The information alleged that as to count 1, defendant personally used a deadly weapon. It further alleged that defendant had served one prior prison term within the meaning of Penal Code section 667.5, subdivision (b).

A jury convicted defendant on counts 1 and 2, but deadlocked on count 3 and on the personal use allegation as to count 1. A mistrial was declared, and count 3 and the personal use allegation were later dismissed. Defendant waived his right to a jury trial on the prior prison term allegation and the court found the allegation true.

The court imposed the upper term of four years on count 1, stayed the term on count 2 pursuant to Penal Code section 654, and imposed a consecutive one-year term for the prior prison term enhancement.

Defendant filed a timely notice of appeal.

FACTS

Defendant and Jane Doe had lived together as a couple for approximately eight years. At the time of the incident which resulted in the current prosecution, they were living in a converted garage behind a house in San Bernardino. The main house was occupied by Sharon Smith, defendant's sister-in-law.

Jane Doe testified that on November 7, 2008, defendant was playing dice with some friends. He blamed her for his loss in the game and began to hit her. They had been drinking vodka and they started to argue.¹ He hit her on the head, back and legs with a hammer. He also hit her with his fists and threatened to kill her. He also threatened to kill her if she left. Jane Doe remained at home that night. She did not have a phone, so she could not call the police. Two days later, she went to her brother's house. Her sister-in-law took her to the hospital to get some medication. The same day, the sister-in-law took her to the police station to report the abuse. The station was busy, so they went home. Police later came to the sister-in-law's home and took Jane Doe's statement and photographed her injuries.

¹ She told police that she and defendant were drinking vodka and that defendant became angry when she drank more of the vodka than he did.

LEGAL ANALYSIS

EVIDENCE THAT DEFENDANT WAS NOT PROSECUTED FOLLOWING A 2004 ARREST FOR DOMESTIC VIOLENCE WAS PROPERLY EXCLUDED

Introduction

Evidence of an incident in 2004 in which defendant allegedly struck Jane Doe on the arm with a crowbar, leaving a two-inch laceration, was admitted pursuant to Evidence Code section 1109.² (All further statutory citations refer to the Evidence Code.) Defendant does not contend that the evidence was not admissible under that statute. He contends, however, that the trial court erred in rejecting his proffered evidence that he was not prosecuted for that incident. He contends that the evidence of non-prosecution was admissible both to weaken the prior domestic violence allegation and to impeach the credibility of Jane Doe's testimony pursuant to section 780.³

As a preliminary matter, we note that defendant initially articulated his first claim as follows: "[T]he trial court erred in admitting the prosecution's evidence of [defendant's] *arrest* for domestic violence in 2004 while excluding the defense's

² Evidence Code section 1109, subdivision (a)(1) provides in pertinent part: "[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

³ Section 780 provides "Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to [the examples which follow.]"

evidence [of non-prosecution] to rebut the claim of prior domestic abuse.” (Italics added.) He did not argue that the evidence of non-prosecution was admissible to rebut the evidence that he committed the alleged prior act of domestic violence. In response to the Attorney General’s argument that any error in admitting evidence that defendant was arrested in the prior incident was invited by the defense, however, defendant maintains that the question of his arrest “misses the point” because “[I]t is not the admission of evidence of a defendant’s arrest that triggers the rule [requiring the admission of evidence of non-prosecution in the prior incident]. It is the admission of *other crimes* as propensity evidence that triggers the rule [requiring the admission of evidence of non-prosecution in the prior incident]” This is not the argument defendant actually made in his opening brief; however, we are willing to assume that it is the argument he intended to make.⁴ Nevertheless, we will first address the argument as defendant actually articulated it.

Defendant’s second argument is also couched in terms of the admissibility of evidence of non-prosecution to rebut evidence concerning his arrest for the prior incident of domestic violence: He contends that evidence that he was not prosecuted should have

⁴ We presume that this is the argument defendant intended to make because in his opening brief, he relies heavily on *People v. Griffin* (1967) 66 Cal.2d 459 (hereafter sometimes *Griffin*). As we discuss below, *Griffin* establishes the rule that evidence of an alleged prior offense may be rebutted by evidence that the defendant was acquitted of the prior offense. (*Id.* at pp. 465-466.) He also relies on cases which extend the *Griffin* rule to evidence that the defendant was not prosecuted for the alleged prior offense. Consequently, we infer that he was merely inartful in couching his argument in terms of rebutting the evidence that he was arrested for domestic violence, as opposed to rebutting the evidence that he committed a prior act of domestic violence.

been admitted pursuant to section 780 to impeach Jane Doe's testimony concerning his prior arrest. He contends that the "prosecution's testimony about [defendant's] arrest clearly opened the door to rebuttal evidence to show that [defendant] was not prosecuted or convicted in connection with that arrest." Nowhere in this argument does defendant contend that the evidence that he was not prosecuted was relevant to impeach Jane Doe's testimony that the 2004 assault took place; he contends only that it was relevant to impeach her testimony concerning his arrest.

As we discuss below, the record shows that the defense failed to object to the single reference to defendant's arrest which was elicited by the prosecution and that it actively elicited other testimony concerning defendant's arrest. This was a deliberate tactical choice. Consequently, defendant may not assert any error on appeal which depends upon an argument that the evidence of his arrest was improperly admitted or that other evidence should have been admissible to rebut the evidence that he was arrested. Because this analysis applies both to defendant's argument that he should have been permitted to impeach Jane Doe's testimony by showing that he was not prosecuted and to his argument that the trial court erred in admitting evidence of his arrest for domestic violence in 2004 while excluding his evidence that he was not prosecuted, we will address those two claims together. We will separately address defendant's contention that the evidence of non-prosecution should have been admitted to rebut the substance of the evidence admitted pursuant to section 1109, as he contends in his reply brief, giving him the benefit of the doubt that that is what he intended to argue in the opening brief.

The defense intentionally elicited evidence of defendant's 2004 arrest for tactical reasons.

Defendant's argument that the court erred in excluding evidence that he was not prosecuted in the 2004 incident is based on the faulty premise that the court wrongfully admitted evidence that defendant was arrested for that incident. The record shows not only that the defense did not object to or seek to have stricken any testimony concerning defendant's arrest which occurred during the prosecutor's direct examination of his witnesses, but that the defense intentionally elicited such evidence.

Contrary to defendant's assertion, Jane Doe was not asked and did not testify on direct examination that defendant was arrested in the 2004 incident. During her cross-examination, however, Jane Doe volunteered that after defendant "went to the jailhouse" in the 2004 incident, she went to the district attorney and told "them" that she had had enough time to think about it and that they should let defendant come home. This testimony was stricken on the prosecutor's motion.

Likewise, the prosecutor did not seek to elicit any testimony about defendant's arrest from Officer Corral, who took Jane Doe's report of the 2004 incident; rather, Officer Corral volunteered the information that defendant was arrested. On direct examination, the prosecutor asked Corral why he went to Jane Doe and defendant's residence. Officer Corral replied that after he spoke to Jane Doe at the police station, he went to the residence she shared with defendant "in an attempt to arrest the suspect." Defense counsel did not move to strike the testimony. The prosecutor did not ask

whether Corral did arrest defendant or pursue the matter in any way. Rather, he asked whether Corral had made contact with defendant and whether he had found the crowbar which was allegedly used in the assault. This was clearly the information he was seeking to elicit by asking why Corral went to the residence.

On cross-examination, defense counsel asked Officer Corral if he interviewed defendant at the residence he shared with Jane Doe. Corral replied that he interviewed defendant “at the booking area where I booked him in.” Rather than seeking to strike that testimony, defense counsel pursued it further, asking Corral, “You arrested him there and took him to the police department?” Corral replied that he had. Counsel then asked if Corral had sent his reports to the district attorney’s office and whether he had ever testified in court about the 2004 incident. Objections were sustained as to those questions. Neither party sought to have Corral’s testimony that he arrested defendant stricken.

After Corral testified, defense counsel asked if the court would allow him to call the deputy district attorney who reviewed the report of the 2004 incident and declined to prosecute. The court denied the request. When defendant later testified, he denied hitting Jane Doe with a crowbar. He testified that he had been arrested and that he had spent five days in jail but that he was released after five days because “the DA dropped the case.” He testified that “they” told him he was not arrested, “just detained.” His testimony that he was released after five days because the district attorney dropped the case was stricken on motion of the district attorney. His testimony that he was told that

he was not arrested but merely detained was also stricken. Neither party sought to strike his testimony that he was arrested and spent five days in jail.

It is clear that the defense chose, as a matter of tactics, to inform the jury that defendant had been arrested in order to attempt to bring in evidence that defendant was not prosecuted. During motions in limine, defense counsel argued that the evidence of the 2004 incident should not be admitted pursuant to section 1109 because Jane Doe's complaint did not result in a prosecution. He argued that "Obviously, some prosecutor thought it wasn't that meritorious a case." The court disagreed, holding that "a filing" is not necessary in order for evidence of a prior incident of domestic abuse to be admissible. Defense counsel did not, at that time, seek a ruling on the admissibility of evidence that defendant was not prosecuted in 2004 to attempt to rebut the section 1109 evidence. However, it is clear from his questions to Officer Corral—whether he submitted his report to the district attorney and whether he ever testified in court about the 2004 incident—that he was attempting to rebut the section 1109 evidence by showing that despite Jane Doe's report of domestic abuse, no prosecution ensued. As part of that strategy, defense counsel deliberately elicited both Corral's testimony that defendant was arrested and defendant's testimony that he was arrested and then released. Accordingly, it was a calculated tactical choice to introduce evidence of defendant's arrest, and defendant may not complain on appeal that the evidence of his arrest was admitted or use that as the basis of a claim that other evidence was improperly excluded. (See *People v.*

Harrison (2005) 35 Cal.4th 208, 237 [defense invited error in admitting hearsay evidence].)

The court did not err in excluding evidence that defendant was not prosecuted for the 2004 incident.

We now turn to the merits of defendant's argument that evidence of non-prosecution was relevant to rebut the prior domestic violence evidence admitted pursuant to section 1109.

In *People v. Griffin, supra*, 66 Cal.2d 459, the California Supreme Court held that if the prosecution is permitted to present evidence that the defendant committed an uncharged offense, the defendant must be permitted to present properly authenticated evidence that he or she was tried and acquitted on the other offense. (*Id.* at pp. 465-466.) The court held, in essence, that "since 'evidence of other crimes always involves the risk of serious prejudice, and it is therefore always 'to be received with 'extreme caution''" [citation] any competent or otherwise admissible evidence tending to weaken and rebut the evidence of the other crime should be admissible." (*People v. Jenkins* (1970) 3 Cal.App.3d 529, 534.) Although an acquittal is not "as convincing of innocence as a judgment of conviction is convincing of guilt" (*Griffin*, at p. 466, fn. 3), *Griffin* holds that a rule requiring the admission of such evidence "is fair to both the prosecution and the defense by assisting the jury in its assessment of the significance of the evidence of another crime with the knowledge that at another time and place a duly constituted

tribunal charged with the very issue of determining defendant's guilt or innocence of the other crime concluded that he was not guilty." (*Id.* at p. 466, fn. omitted.)

In *People v. Jenkins*, *supra*, 3 Cal.App.3d 529, on which defendant relies, the court extended the *Griffin* rule to hold that evidence that the defendant was not prosecuted for the prior offense also tends to weaken and rebut the prosecution's evidence that the defendant committed the other offense. (*Id.* at pp. 533-535; see also *People v. Mendoza* (1974) 37 Cal.App.3d 717, 723-724 [instruction that no prosecution resulted from alleged prior acts sufficed where defendant argued he was prejudiced by not being allowed to impeach police officer's opinion of prior victim's veracity with evidence that "no criminal complaint or arrest had resulted" from prior victim's allegations].) We disagree, however, that evidence of non-prosecution necessarily tends to rebut the evidence that the defendant committed the prior offense. There can be many reasons for declining to prosecute, including the unavailability of witnesses, the prosecutor's perception that the victim may not be viewed as credible by a jury, or a myriad of other problems of proof which have no bearing on the truthfulness or accuracy of the testimony describing the incident. As the trial court noted, the prosecution's inability to muster proof beyond a reasonable doubt is not relevant to the admissibility of other crimes evidence because the jury is required to determine only by a preponderance of the evidence whether the alleged prior act was committed. (See *People v. Mullens* (2004) 119 Cal.App.4th 648, 667-668.) Accordingly, problems of proof which are sufficient to deter a prosecution are not necessarily sufficient to undermine confidence in

the evidence for purposes of proving an alleged prior criminal act took place.

Consequently, while it is conceivable that under some circumstances a prosecutor's reasons for declining to prosecute may be relevant to rebut the prosecution's evidence concerning a prior offense or to impeach the testimony of the alleged victim of the prior offense, the bare fact that no prosecution resulted from a victim's crime report is not relevant to rebut the prior crimes evidence or to impeach the victim's veracity.

Accordingly, we disagree with any implication in *People v. Jenkins, supra*, that such evidence is always relevant and admissible. On the contrary, in most instances, such evidence is not relevant.

In this case, the defense made no offer of proof as to the reasons the deputy district attorney would give for declining to prosecute if he were called to testify. The proponent of evidence has the burden of demonstrating its relevance, and the failure to do so precludes appellate review of any contention that the evidence was erroneously excluded. (§ 354; *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 344.) Accordingly, the trial court did not abuse its discretion in determining that the proffered testimony was not admissible. For the same reason, it also did not abuse its discretion in striking defendant's testimony that the "DA dropped the case."

The Attorney General argues at length that the *Griffin* rule does not apply to evidence of prior sexual crimes admitted pursuant to section 1108 or to evidence of prior acts of domestic violence admitted pursuant to section 1109 because in enacting those statutes, which permit the use of the prior crimes evidence to prove that the defendant has

the propensity to commit such acts, the Legislature determined that the relevance of the uncharged acts is greater than the possible prejudice to the defendant. He contends that *People v. Mullens, supra*, 119 Cal.App.4th 648, which holds that the *Griffin* rule applies to section 1108 evidence, was wrongly decided. (See *Mullens*, at pp. 665-669.) He concedes, however, that the admission of evidence pursuant to sections 1108 and 1109 is nevertheless subject to section 352, which requires the court to determine that the probative value of the evidence outweighs its potential prejudice to the defendant. (§ 1108, subd. (a); § 1109, subd. (a)(1); see *People v. Falsetta* (1999) 21 Cal.4th 903, 916-917.)

We see no rational basis for concluding that the Legislature intended that evidence pursuant to section 1108 or section 1109 be subject to a section 352 analysis, yet be impervious to rebuttal by a showing that the defendant was tried and acquitted on charges based on the conduct which is alleged under those sections. On the contrary, we agree with the court in *People v. Mullens* that the *Griffin* rule applies where there is competent evidence that the defendant was acquitted on the alleged prior offense. (*People v. Mullens, supra*, 119 Cal.App.4th at pp. 665-669.) *Mullens* does not support defendant's argument, however, because he was not tried and acquitted in the 2004 incident.

The exclusion of the evidence did not violate defendant's constitutional rights.

Defendant contends that the exclusion of the non-prosecution evidence deprived him of his due process right to put on a defense and of his Sixth Amendment right to confront an adverse witness.

A defendant has a due process right to present all *relevant* evidence of significant probative value to his defense, including evidence which may impeach a prosecution witness. (See, e.g., *People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1457.) He has no due process or other constitutional right to introduce evidence which is not relevant to a material issue in the prosecution. (*Wood v. State of Alaska* (9th Cir. 1992) 957 F.2d 1544, 1550.) Because defendant failed to show that the evidence that he was not prosecuted was relevant, either to rebut the section 1109 evidence or to impeach Jane Doe, the exclusion of that evidence did not violate his constitutional rights.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ McKinster
J.

We concur:

/s/ Hollenhorst
Acting P.J.
/s/ Miller
J.